

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,242

312

WILLIAM A. ALBAUGH,
Democratic Candidate for Maryland,
Representative-at-large to the
United States House of Representatives,
for himself and the people of the geographic State of Maryland,
Appellant,

v.

RALPH R. ROBERTS,
Clerk of the United States House of Representatives,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED SEP 7 1962

Joseph W. Stewart

CLERK

WILLIAM A. ALBAUGH

3368 Chillum Rd., Apt. 201
Mt. Rainier, Maryland

Appellant, Pro Se

(i)

QUESTIONS PRESENTED

1. Whether the District of Columbia is a part of the geographic State of Maryland?

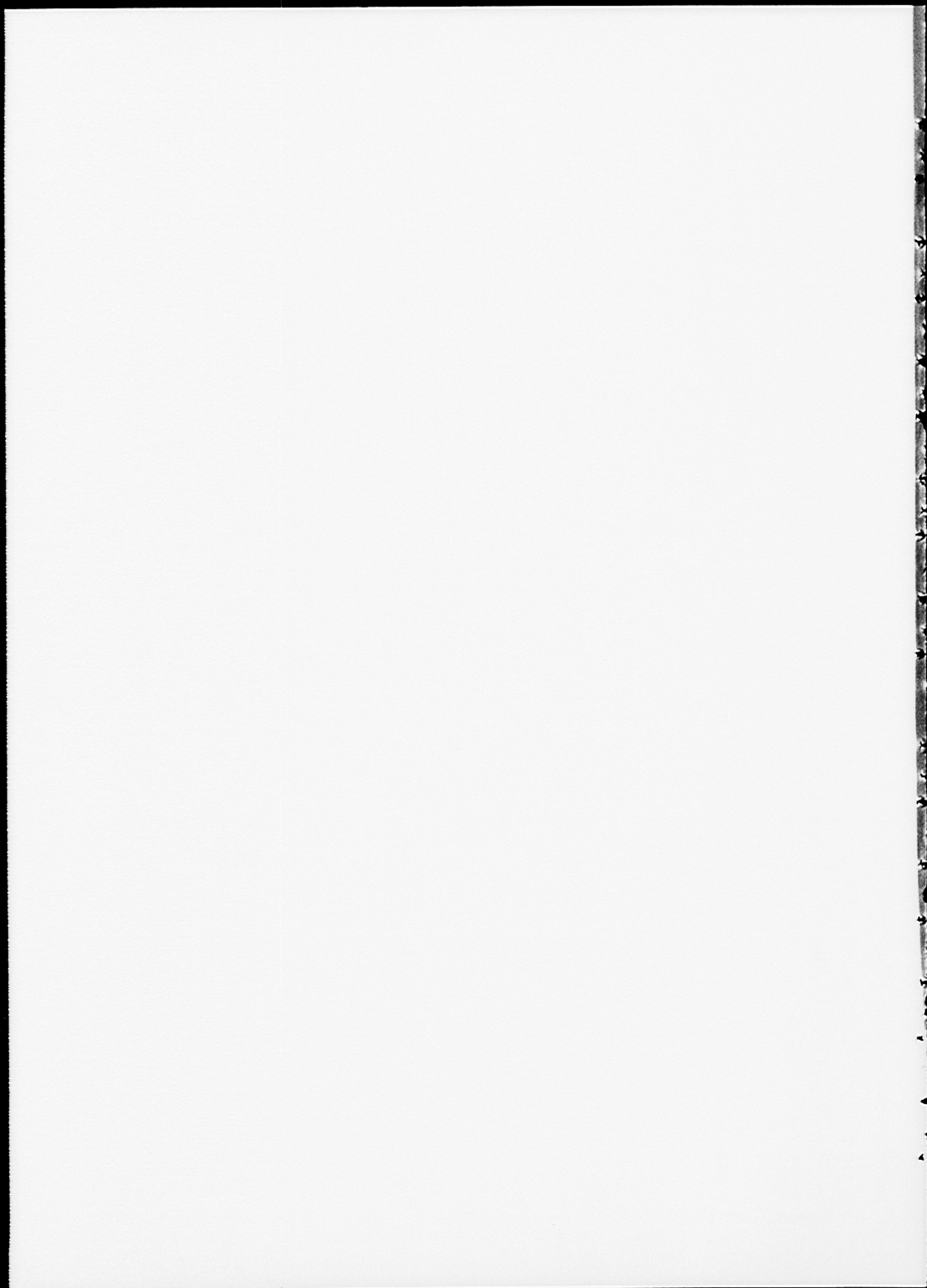
2. Whether a Maryland citizen and Congressman-at-large candidate is entitled to contest an apportionment of representatives based upon the assumption that the District of Columbia is not a part of the geographic State of Maryland?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,242

WILLIAM A. ALBAUGH,
Democratic Candidate for
Maryland Representative-at-
large to the United States House
of Representatives, for himself
and the people of the geographic
State of Maryland,

Appellant,

v.

RALPH R. ROBERTS,
Clerk of the United States House
of Representatives,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment for the Appellee (Defendant below) which was entered on July 17, 1962. This action is a civil

case brought under 28 U.S.C. 2201 seeking relief by declaratory judgment for the deprivation of constitutional privileges on account of residence. Jurisdiction of the District Court arises under Constitution Art. IV, Sec. 2 and 28 U.S.C. 1343 and 1331. The notice of appeal was filed below on July 19, 1962. The complaint is at (J.A. 2), the judgment below at (J.A. 11).

The jurisdiction of this Court rests upon 28 U.S.C. 1291.

STATEMENT OF THE CASE

On May 1, 1962 the Appellant, William A. Albaugh, democratic candidate for Maryland Representative-at-large to the United States House of Representatives filed a complaint (J.A. 2) in the United States District Court for the District of Columbia against the Appellee, Ralph R. Roberts, Clerk of the United States House of Representatives seeking relief by declaratory judgment for the deprivation of constitutional privileges contingent upon the District of Columbia being treated as a part of the geographic State of Maryland.

The complaint alleges that the territory now known as the District of Columbia was a part of the national election district of Maryland when representatives were apportioned for the First Congress. That the District of Columbia has not been transferred to a different national election district. That the Constitution does not authorize the removal of any national election district territory from the total collection of national election district territories. That the District of Columbia is now a part of the national election district of Maryland. That the Apportionment Report contained in the Eighty-Seventh Congress House Document No. 46 page 2 (J.A. 4) was based upon the assumption that the District of Columbia was not a part of the national election district of Maryland. That on January 12, 1961 the Appellee certified eight representatives to the national election district of Maryland for the United States House of Representatives in the Eighty-Eighth Congress and

cited House Document No. 46 as the basis for this apportionment (J.A. 6). That had the Apportionment Report been based upon the assumption that the District of Columbia was a part of the national election district of Maryland, it would have apportioned nine representatives to Maryland. That Appellee committed an unauthorized act when he certified eight representatives to Maryland instead of nine. That Appellee's malapportionment deprives Maryland of one representative and the remuneration as well as the legislative power related thereto. That the Appellee's malapportionment changes the entire character of the constituency with respect to Congressional seats which must be filled by at-large elections and makes invalid both the expensive campaigns and the expensive elections currently being conducted in Maryland to fill at-large seats for the Eighty-Eighth Congress. And that delay in correcting Appellee's mistake will, in general, subject the people of Maryland to great financial loss and, in particular, subject the Appellant, an at-large candidate, to special losses.

In his motion to dismiss, Appellee asserted that cession to Congress caused the District of Columbia to cease to be a part of any State. Otherwise, the Appellee failed to deny any of the allegations in the complaint within the 60 days allowed (J.A. 8).

On July 17, 1962, the District Court entered judgment for the Appellee on the grounds that the complaint failed to state a claim upon which relief could be granted, that the Court lacked jurisdiction over the subject matter, and the issue therein presented a non-justiciable political question (J.A. 11). The Appellant appealed on July 19, 1962 (J.A. 11).

ORGANIC AND STATUTE LAWS INVOLVED

I Constitution, Art. I, Sec. 2

"Representatives . . . shall be apportioned among the several states . . . according to their respective numbers, . . ."

II Constitution, Art. IV, Sec. 2

"The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states . . ."

III Constitution, Art. IV, Sec. 4

"The United States shall guarantee to every state in this union, a republican form of government, . . ."

IV Act of Congress Accepting Ceded Territory

"AN ACT FOR ESTABLISHING THE TEMPORARY AND PERMANENT SEAT OF THE GOVERNMENT OF THE UNITED STATES.

Sec. 1. "Be it enacted by the Senate and House of Representatives, of the United States of America in Congress assembled, that a district of territory, not exceeding ten miles square, to be located as hereafter directed on the river Potomac, at some place between the mouths of the Eastern Branch and Connogochegue, be, and the same is hereby accepted for the permanent seat of the government of the United States. Provided, nevertheless, that the operation of the laws of the state within such district shall not be affected by this acceptance, until the time fixed for the removal of the government thereto, and until Congress shall otherwise by law provide . . ."

(July 16, 1790, ch 28, 1 Stat. 130)

STATEMENT OF POINTS

1. Since the District of Columbia is a part of the geographic State of Maryland, judgment construing the original cession to Congress should have been entered for the Appellant.

2. Since a Maryland citizen and Congressman-at-large candidate is entitled to contest an apportionment of representatives based upon the assumption that the District of Columbia is not a part of the geographic State of Maryland, judgment relating to deprivation of constitutional privileges on account of residence should have been entered for the Appellant.

SUMMARY OF ARGUMENT

Constitution Art. IV creates special property rights in state territory and guarantees to protect these rights. Transforming state territory into non-state territory violates these special rights and is, therefore, prohibited. Consequently, cession of the District of Columbia to Congress may not be construed as removing the territory from the geographic State of Maryland.

Appellee apportioned representatives (J.A. 6) to Maryland on the basis that the District of Columbia was not a part of Maryland. This exclusion deprived Appellant, a Maryland citizen and Congressman-at-large candidate, of the privilege of receiving proportional representation and complete at-large election results because of his residence in the State of Maryland. Since Art. IV, Sec. 2 (Br. 4) prohibits discrimination on account of residence, Appellant has a legal right to contest the incorrect apportionment.

ARGUMENT

I

THE DISTRICT OF COLUMBIA IS A PART OF THE GEOGRAPHIC STATE OF MARYLAND

Prior to the Congressional Act of Accepting Ceded Territory which was approved on July 16, 1790, 1 Stat. 130, ch. 28 (Br. 4) the District of Columbia was a part of the geographic State of Maryland and under the joint legislative control of Congress and the Maryland State Legislature. Cession transferred to Congress the partial legislative control vested in the Maryland State Legislature. In the ten year period immediately following cession Congress provided that the operation of the laws of Maryland within the District of Columbia should be unaffected by the cession. Although Congress retained authority to veto any and all laws of Maryland operating within the ceded territory during this period,

it did not exercise this authority and, significantly, District of Columbia citizens continued to vote in all Maryland national elections through the national election of November, 1800.

In the case of Hepburn v. Ellzey, 6 U.S. 445 (1805) Justice Marshall ruled that the term "state" applies only to those political divisions which are treated as separate units in the apportionment of representatives to Congress. Since the District of Columbia citizens voted in national elections as Maryland citizens for ten years following cession, it is a fact that the District of Columbia was treated as a part of the geographic State of Maryland for a very long period following cession.

In addition to this practical precedent that flies in the face of Appellee's contention that the Act of Cession must be construed as removing the District of Columbia from the geographic State of Maryland (J.A. 8) and as transforming this state territory into non-state territory, Appellant relies upon the fundamental conflict that this construction generates when compared with the Constitutional provisions that create special property rights in state territory and guarantee to protect these rights. Constitution Art. IV provides:

Sec. 2. "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states . . ."

Sec. 4. "The United States shall guarantee to every state in this union, a republican form of government, . . ."

The former clause means that the citizens residing in states have a legal right to be protected against any deprivation of privileges on account of place of residence. The latter clause means that the citizens residing in states have a legal right to be protected against any form of taxation without representation. United States citizens who reside on state territory have the privilege of invoking these protective clauses whenever the aforesaid legal rights are violated. United States citizens who do not reside on state territory do not have the privilege of invoking these protective clauses. Transforming state territory into non-state

territory, therefore, has the effect of depriving the resident citizens of the privilege of invoking these protective clauses. Since any denial of privileges on account of place of residence is forbidden by Art. IV, Sec. 2, such a transformation is forbidden.

Consequently, the cession must be construed as a legislative cession only and the District of Columbia must continue to be a part of the geographic State of Maryland.

II

A MARYLAND CITIZEN AND CONGRESSMAN-AT-LARGE CANDIDATE
IS ENTITLED TO CONTEST AN APPORTIONMENT OF REPRESENTATIVES
BASED UPON THE ASSUMPTION THAT THE DISTRICT OF COLUMBIA
IS NOT A PART OF THE GEOGRAPHIC STATE OF MARYLAND

Granted the previous argument that the District of Columbia is a part of the geographic State of Maryland, excluding the District of Columbia in the apportionment report (J.A. 4) deprived Maryland citizens of the privilege of receiving representation in direct proportion to population as provided in Constitution Art. I, Sec. 2:

"Representatives . . . shall be apportioned
among the several states . . . according to their
respective numbers . . ."

With the District of Columbia population included, Maryland's population warranted nine representatives. Appellee apportioned eight representatives to Maryland (J.A. 6).

Appellee's apportionment set a precedent which caused the District of Columbia vote to be excluded in the Maryland Congressman-at-large elections. If this vote had not been excluded, it is possible that Appellant would have been elected instead of being defeated.

Since Art. IV, Sec. 2 gives citizens of states a legal right to be protected against discrimination on account of resident, as shown in the previous argument, and since Appellee's incorrect apportionment denies

to Appellant, a Maryland citizen and Congressman-at-large candidate, the privilege of receiving proportional representation and complete at-large election returns on account of his residence in the State of Maryland, Appellant is entitled to contest the incorrect apportionment.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court granting Appellee's motion to dismiss the complaint should be reversed, and judgment entered for Appellant.

Respectfully submitted,

WILLIAM A. ALBAUGH

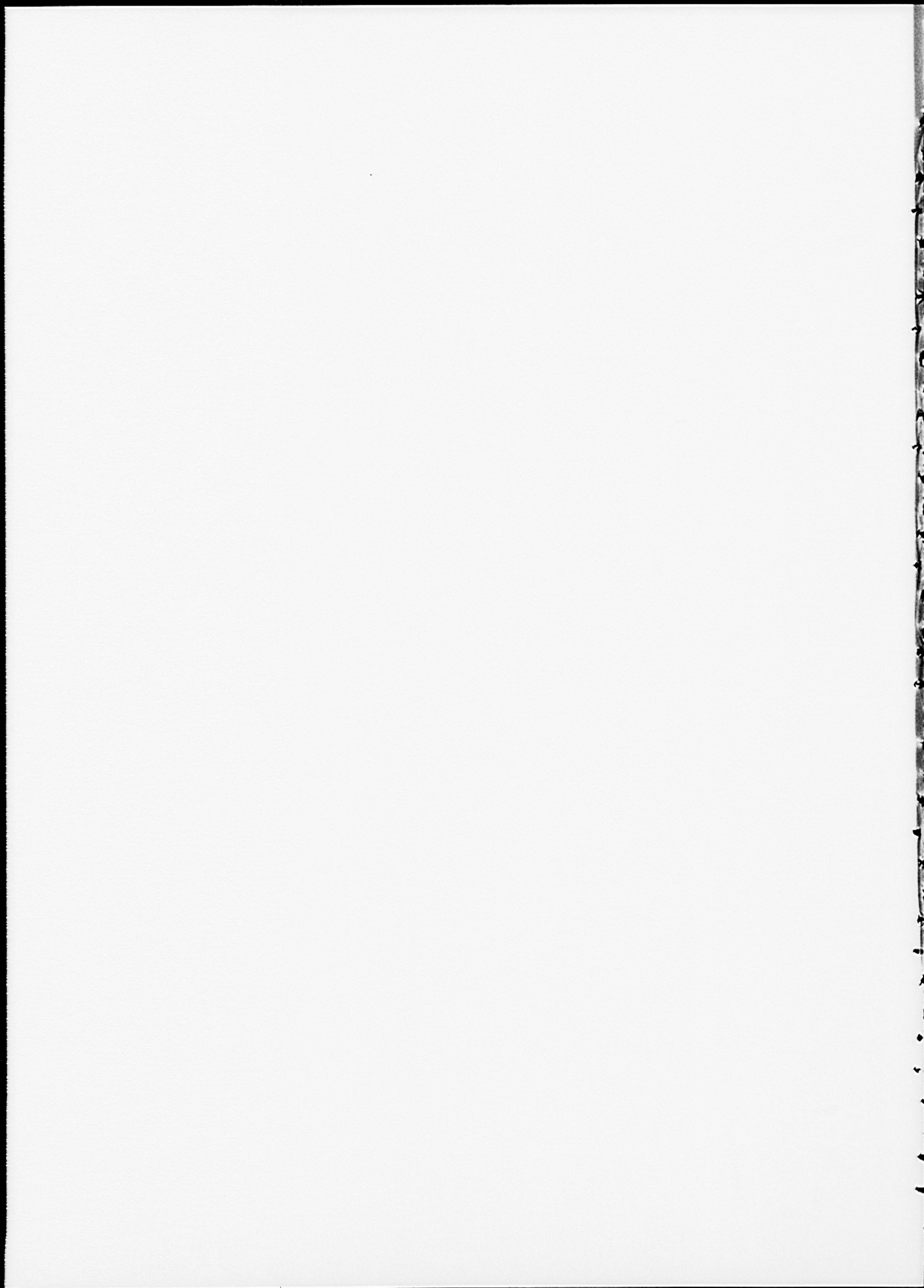
3368 Chillum Rd. Apt. 201
Mt. Rainier, Maryland

Appellant Pro Se

August, 1962

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JOINT APPENDIX

IN THE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM A. ALBAUGH,
Democtatic Candidate for Maryland
Representative-at-large to the
United States House of Representa-
tives, for himself and the people
of the national election district
of Maryland,

Plaintiff,

vs.

RALPH R. ROBERTS,
Clerk of the House of Representa-
tives of the Congress of the
United States,

Defendant.

Civil Action
No. 1405-62

RELEVANT DOCKET ENTRIES

1962

May 1	Complaint, * * *
	* * * * *
June 28	Motion of deft. to dismiss complaint * * *
June 28	Points & Authorities of deft. in support of motion to dismiss.
July 2	Points & Authorities of plttf. in opposition to deft's motion to dismiss.
July 17	Order granting motion to dismiss and dismissing cause. (N) Pine, J.
July 19	Notice of appeal by plttf from order of 7/17/62 * * *

[Filed May 1, 1962]

COMPLAINT FOR THE UNAUTHORIZED REMOVAL OF
THE DISTRICT OF COLUMBIA FROM THE NATIONAL
ELECTION DISTRICT OF MARYLAND IN THE APPORTION-
MENT OF REPRESENTATIVES FOR THE UNITED STATES
HOUSE OF REPRESENTATIVES FOR THE EIGHTY-EIGHTH CONGRESS

Comes now William A. Albaugh, Democratic candidate for the Maryland Representative-at-large Seat for the United States House of Representatives in the Eighty-Eighth Congress, of 3368 Chillum Rd. Apt. 201, Mt. Rainier, Prince George's County, Maryland on this 1st day of May AD 1962 and prays the Court hear this complaint of William A. Albaugh, plaintiff, against Ralph R. Roberts, Clerk of the House of Representatives of the Congress of the United States, of 2660 Connecticut Ave., N.W. Washington, D.C., with offices at House Extension Rm. 119 United States House of Representatives Washington, D.C., defendant.

The jurisdiction of this Court is invoked under 28 U.S.C. 1343 and 1331.

* * * * *

1. The territory now known as the District of Columbia was a part of the national election district of Maryland when representatives were apportioned for the United States House of Representatives in the First Congress.

2. The District of Columbia has not been transferred to a different national election district.

3. The Constitution does not authorize the removal of any national election district territory from the total collection of national election district territories.

4. The District of Columbia is now a part of the national election district of Maryland.

5. The Apportionment Report contained in the Eighty-Seventh Congress House Document No. 46 page 2 was based upon the assumption that the District of Columbia was not a part of the national election district of Maryland.

6. On January 12, 1961 the defendant certified eight representatives to the national election district of Maryland for the United States House of Representatives in the Eighty-Eighth Congress and cited House Document No. 46 as the basis for this apportionment.

7. Had the Apportionment Report in House Document No. 46 been based upon the assumption that the District of Columbia is a part of the national election district of Maryland, it would have apportioned nine representatives to Maryland instead of eight.

8. Defendant committed an unauthorized act when he certified eight representatives to Maryland instead of nine.

9. Defendant's misapportionment deprives Maryland of one representative and the remuneration as well as the legislative power related thereto.

10. Defendant's misapportionment changes the entire character of the constituency with respect to Congressional Seats which must be filled by at-large elections and makes invalid both the expensive campaigns and the expensive elections currently being conducted in Maryland to fill at-large Seats for the Eighty-Eighth Congress.

11. Any further delay in correcting the defendant's mistake will only increase the great financial loss which must be sustained by the people in general and by the plaintiff, an at-large candidate, in particular as a result of invalid at-large elections.

WHEREFORE the plaintiff respectfully requests the Court determine the facts of this controversy, interpret the law, and render a judgment; that in the event the Court finds the District of Columbia is a part of the national election district of Maryland, the Court require the defendant to use a corrected Apportionment Report based upon this finding and to recertify incorrect certificates that may have previously been transmitted to the various national election districts, and take such other action as the Court deems proper.

/s/ William A. Albaugh
3368 Chillum Rd. Apt. 201
Mt. Rainier, Maryland
Phone: 277 0246
Plaintiff, Pro Se

[Filed May 23, 1962]

EXHIBIT - 1

THE APPORTIONMENT REPORT BASED UPON THE 1960 CENSUS
(87th Congress House Document No. 46, p. 2)

* * *

State	1960 Population	Apportionment of 435 Representatives according to 1960 pop.
United States	179, 323, 175	435
Alabama	3, 266, 740	8
Alaska	2 26, 167	1
Arizona	1, 302, 161	3
Arkansas	1, 786, 272	4
California	15, 717, 204	38
Colorado	1, 753, 947	4
Connecticut	2, 535, 234	6
Delaware	446 , 292	1
District of Columbia	763, 956	-
Florida	4, 951, 560	12
Georgia	3, 943, 116	10
Hawaii	632, 772	2
Idaho	667, 191	2
Illinois	10, 081, 158	24
Indiana	4, 662, 498	11
Iowa	2, 757, 537	7
Kansas	2, 178, 611	5
Kentucky	3, 038, 156	7
Louisiana	3, 257, 022	8
Maine	969, 265	2

Maryland	3, 100, 689	8
Massachusetts	5, 148, 578	12
Michigan	7, 823, 194	19
Minnesota	3, 413, 864	8
Mississippi	2, 178, 141	5
Missouri	4, 319, 813	10
Montana	674, 767	2
Nebraska	1, 411, 330	3
Nevada	285, 278	1
New Hampshire	606, 921	2
New Jersey	6, 066, 782	15
New Mexico	951, 023	2
New York	16, 782, 304	41
North Carolina	4, 556, 155	11
North Dakota	632, 446	2
Ohio	9, 706, 397	24
Oklahoma	2, 328, 284	6
Oregon	1, 768, 687	4
Pennsylvania	11, 319, 366	27
Rhode Island	859, 488	2
South Carolina	2, 382, 594	6
South Dakota	680, 514	2
Tennessee	3, 567, 089	9
Texas	9, 579, 677	23
Utah	890, 627	2
Vermont	389, 881	1
Virginia	3, 966, 949	10
Washington	2, 853, 214	7
West Virginia	1, 860, 421	5
Wisconsin	3, 951, 777	10
Wyoming	330, 066	1

[Filed May 23, 1962]

EXHIBIT - 2

DEFENDANT'S CERTIFICATE OF APPORTIONMENT
TO THE EXECUTIVE OF MARYLAND TOGETHER WITH
LETTER OF TRANSMITTAL.

HOUSE OF REPRESENTATIVES
OFFICE OF THE CLERK
WASHINGTON, D. C.

I, Ralph R. Roberts, Clerk of the House of Representatives of the United States, hereby certify, pursuant to section 22, subdivision (B), of the Act of the Congress of the United States of America, entitled "An Act to provide for the Fifteenth and subsequent decennial censuses and to provide for apportionment of Representatives in Congress", approved June 18, 1929, as amended by Public Law, Numbered 481, Seventy-sixth Congress, approved April 25, 1940, and Public Law, Numbered 291, Seventy-seventh Congress Approved November 15, 1941, that the State of

M A R Y L A N D

shall be entitled, in the Eighty-eighth Congress and in each Congress thereafter until the taking effect of a reapportionment under said Act, as amended, or subsequent statute, to

E I G H T R E P R E S E N T A T I V E S

IN THE House of Representatives of the Congress of the United States.

(Seal)

In witness whereof I hereto affix my name and the seal of the House of Representatives of the United States of America this twelfth day of January, Anno Domini 1961, in the City of Washington, District of Columbia.

/s/ Ralph R. Roberts
Clerk of the House of Representatives
of the United States

Letter of Transmittal

* * *

The Honorable
The Governor of Maryland
Annapolis, Maryland

January 12, 1961

Sir:

I have the honor to transmit herewith, * * * my certificate attested by the Seal of the House of Representatives, showing the number of Representatives to which your State shall be entitled in the Eighty-eighth Congress * * *

Your attention is directed to Section 22 of the Act of Congress herewith, relating to apportionment of Representatives, and a copy of the message of the President of the United States of January 10, 1961, transmitting to Congress the population basis of apportionment, and the apportionment of Representatives by the method of equal proportions, * *

/s/ Ralph R. Roberts
Clerk of the House of Representatives of the United States

[Filed June 28, 1962]

MOTION TO DISMISS

Comes now the defendant by his attorney, the United States Attorney, and respectfully moves this Court to dismiss the complaint for the following reasons:

1. The issue presented therein is a political question and thus non-justiciable;
2. The Court lacks jurisdiction over the subject matter, and
3. The complaint fails to state a claim on which relief can be granted and is frivolous.

/s/ David C. Acheson
United States Attorney

/s/ Charles T. Duncan
Assistant United States Attorney

/s/ Joseph M. Hannon
Assistant United States Attorney

/s/ Frank Q. Nebeker
Assistant United States Attorney

(Certificate of Service)

MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT OF DEFENDANT'S MOTION TO DISMISS

Plaintiff seeks to compel the defendant, Clerk of the House of Representatives, to "use a corrected Apportionment Report" based upon the asserted premise that the District of Columbia should be considered a part of Maryland for the purpose of establishing the number of representatives from the State of Maryland to the Congress of the United States. At the outset it is noted such premise is faulty for clearly the cession of that territory of Maryland to the United States (Vol. 1 D.C. Code, p. XXII-XXV) and its acceptance by the United States (Vol. 1 D.C. Code, p. XXV; 1 Stat. 139, ch. 28) clearly removed the area in question from Article I, Section 2 of the Constitution. That Section provides, inter alia: "Representatives . . . shall be apportioned among the several States." (Emphasis supplied.) Certainly when the territory in question was ceded to the United States to be the seat of Government, it ceased to be a part of one of "the several States" and came under the "exclusive" legislative jurisdiction of Congress (Article I, Section 8 of the Constitution) so that Article I, Section 4 ^{1/} can have no effect therein.

Moreover, an analysis of the issue presented by the complaint clearly shows the existence of a non-justiciable political question, i.e.

^{1/} That Section provides: "The Time, Place and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof, . . . "

a question decided, or to be decided, by a political branch of government co-equal with the judicial branch. In Colegrove v. Green, 328 U. S. 549, Mr. Justice Rutledge in his concurring opinion noted:

I concur in the result. But for the ruling in Smiley v. Holm, 285 U. S. 355, I should have supposed that the provisions of the Constitution, Art. I, Sec. 4, that "The Times, Places and Manner of holding Elections for *** Representatives, shall be prescribed in each state by the Legislature thereof; but the Congress may at any time by law make or alter such Regulations ***"; Art. I, Sec. 2, vested in Congress the duty of apportionment of representatives among the several states "according to their respective numbers"; and Art. I, Sec. 5, making each House the sole judge of the qualifications of its own members, would remove the issues in this case from justiciable cognizance. But, in my judgment the Smiley case rules squarely to the contrary, save only in the matter of degree. *** Id. at 564.

The approach taken by Justice Rutledge is appropriate in this case. However, neither Colegrove nor Smiley, which Mr. Justice Rutledge felt bound by, control this case. Both Colegrove and Smiley dealt with same action which had been taken by a State. No State action is involved in this case, but the action involved is that of the Federal House of Representatives. Such action was taken by the House pursuant to Article I, Sec. 2 of the Constitution, and any review thereof involves a political question.

The recent decision of the Supreme Court in Baker v. Carr, 82 S. Ct. at 714:

We come, finally to the ultimate inquiry whether our precedents as to what constitutes a non-justiciable "political question" bring the case before us under the umbrella of that doctrine. A natural beginning is to note whether any of the common characteristics which we have been able to identify and label descriptively are present. We find none: The question here is the consistency of state action with the Federal Constitution. We have no question

decided, or to be decided, by a political branch of government co-equal with this court.

While Baker, Colegrove and Smiley are not "political question" situations since there is "no question decided, or to be decided, by a political branch of government co-equal with this court," it is just this situation of having a question decided by a co-equal branch of government (House of Representatives) that makes this case non-justiciable.

Plaintiff has alleged jurisdiction under 28 U. S. C. Sec. 1343. However, Section 1343 is inapplicable to the present case. Subdivisions 1, 2, and 4 of the Section deal with damages, and subdivision 3 deals with redressing wrongs committed under color of state law. No state law or state action is involved in this case. Plaintiff's complaint seeks redress because he feels that the apportionment report contained in the 87th Congress House Document No. 46 is incorrect. There is no allegation of a "deprivation, under color of any state law."

/s/ David C. Acheson
United States Attorney

* * *

[Filed July 2, 1962]

MEMORANDUM OF POINTS AND AUTHORITIES IN
OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

1. The defendant relies solely upon the 1790 cession, involving the Maryland Act of Cession (Dec. 23, 1788 ch. 46) and the Congressional Act of Acceptance of July 16, 1790 (1 Stat. 139, ch. 28), as authority for converting Maryland state territory into non-state territory.

2. A cession prior to the adoption of the Constitution, when total sovereignty over the State of Maryland was vested in the Maryland General Assembly, was capable of such a conversion.

3. When the Constitution was adopted in 1788, national privileges were made contingent upon state status.

4. Any cession after June 21, 1788 which converted state territory into non-state territory would conflict with the Constitutional provisions

guaranteeing national privileges to all state citizens.

5. The only valid Constitutional interpretation of the 1790 cession is one that limits the cession to a transfer of legislative control over the ceded territory's local government and leaves undisturbed the District of Columbia's status as state territory.

/s/ William A. Albaugh
Plaintiff

(Certificate of Service)

[Filed July 17, 1962]

ORDER

This cause having come on for hearing on defendant's motion to dismiss, and on consideration of the memorandum of points and authorities in support of defendant's motion to dismiss, and the memorandum of points and authorities in opposition thereto, and upon further consideration of argument of plaintiff and argument on behalf of the defendant, and it appearing to the Court that the complaint fails to state a claim upon which relief can be granted, and that the Court lacks jurisdiction over the subject matter and that the issue herein presents a non-justiciable political question, it is this 17th day of July, 1962.

ORDERED that the defendant's motion to dismiss be and the same hereby is granted and that the complaint be and the same hereby is dismissed with prejudice.

/s/ David A. Pine
United States District Judge

(Certificate of Service)

[Filed July 19, 1962]

NOTICE OF APPEAL

Notice is hereby given this 19th day of July, 1962 that William A. Albaugh, plaintiff hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 17th day of July, 1962, in favor of defendant against said plaintiff.

/s/ William A. Albaugh
Plaintiff

BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 17,242

WILLIAM A. ALBAUGH, APPELLANT

v.

RALPH R. ROBERTS, CLERK OF THE UNITED STATES
HOUSE OF REPRESENTATIVES, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

OCT 2 1962

Joseph W. Stewart
CLERK

JOSEPH D. GUILFOYLE,
Acting Assistant Attorney General,

DAVID C. ACHESON,
United States Attorney,

MORTON HOLLANDER,
RICHARD S. SALZMAN,
Attorneys,
Department of Justice,
Washington 25, D. C.

QUESTIONS PRESENTED

In the opinion of the appellee the following questions are presented:

1. Whether the Clerk of the United States House of Representatives is a proper party defendant in an action alleging the misapportionment of the members of that House among the States.

2. Whether the Clerk of the United States House of Representatives is a proper party defendant in an action to require that persons in the District of Columbia be permitted to vote in elections for United States Representative-at-large from the State of Maryland.

3. Whether appellant, a citizen of the State of Maryland, has standing to complain that he was denied his constitutional right to fair representation in the United States House of Representatives because Maryland was allotted Representatives solely on the basis of its own population and not on the basis of that population plus the population of the District of Columbia.

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IN THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 17,242

WILLIAM A. ALBAUGH,

Appellant,

v.

RALPH R. ROBERTS, Clerk of the United States
House of Representatives,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant, an unsuccessful candidate for the Democratic nomination for the United States Representative-at-large from Maryland, ^{1/} filed this action in the district court on

1/ Appellant describes himself as the "Democratic Candidate for Maryland, Representative-at-large to the United States House of Representatives" for the 88th Congress. However, he states that he was defeated (Br. p. 7). As the general election for the United States Representatives to the 88th Congress has not been held, and as Mr. Carlton Sickles is the Democratic nominee for Maryland Congressman-at-large, appellant must have been unsuccessful in the primary election.

May 1, 1962 (J.A. 2). The substance of Mr. Albaugh's complaint is that Maryland should be allotted Congressmen on the basis of the combined population of that State and the District of Columbia.

As provided in 2 U.S.C. § 2a(a), on January 10, 1961, President Eisenhower transmitted to Congress a statement showing the population of each state, determined by the 1960 census, and the number of Representatives out of the 435 total to which each state was proportionably entitled on the basis of its population, no state receiving less than one Representative. House Doc. No. 46, 87th Cong., 1st Sess., Jan. 12, 1961 (J.A. 4). Under 2 U.S.C. § 2a, each state is entitled to the number of Representatives as shown in that apportionment statement. The sole duty of appellee in his capacity as Clerk of the United States House of Representatives is to transmit to each state governor an official certificate showing the number of Representatives allotted his state in the President's apportionment statement. 2 U.S.C. §2a(a) and (b). That apportionment statement showed that Maryland, on the basis of its population (excluding residents of the District of Columbia), was entitled to eight Representatives (J.A. 5). Appellee certified that number of Representatives to the Governor of Maryland (J.A. 6).

Mr. Albaugh brought this suit in the district court to require appellee to certify to the Governor of Maryland that his state was entitled to nine Representatives (J.A. 3). It is his theory that District of Columbia residents must be included in the population of Maryland for the purpose of computing the number of United States Representatives to which it was entitled, and as this was not done, Mr. Albaugh complained that "defendant's misapportionment deprives Maryland of one Representative * * * " (J.A. 3). (Emphasis supplied.)

Appellant also urged that the denial to the residents of the District of Columbia of the right to vote in the Maryland primary elections for Congressman-at-large was an unconstitutional violation both of their rights and his, since if they had been allowed to vote, he might have received the nomination (Br. p. 7).

The district court dismissed his complaint on July 17, 1962. (J.A. 11). From that dismissal an appeal was timely noted (J.A. 11).

STATUTE INVOLVED

2 U.S.C. §2a, 46 Stat. 26, as amended:

(a) On the first day, or within one week thereafter, of the first regular session of the Eighty-second Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as

ascertained under the seventeenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member.

(b) Each State shall be entitled, in the Eighty-third Congress and in each Congress thereafter until the taking effect of a reapportionment under this section or subsequent statute, to the number of Representatives shown in the statement required by subsection (a) of this section, no State to receive less than one Member. It shall be the duty of the Clerk of the House of Representatives, within fifteen calendar days after the receipt of such statement, to send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section. In case of a vacancy in the office of Clerk, or of his absence or inability to discharge this duty, then such duty shall devolve upon the Sergeant at Arms of the House of Representatives; and in case of vacancies in the offices of both the Clerk and the Sergeant at Arms, or the absence or inability of both to act, such duty shall devolve upon the Doorkeeper of the House of Representatives.

(c) Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner: (1) If there is no change in the number of Representatives, they shall be elected from the districts then prescribed by the law of such State, and if any of them are elected from the State at large they shall continue to be so elected; (2) if there is an increase in the number

of Representatives, such additional Representative or Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; (3) if there is a decrease in the number of Representatives but the number of districts in such State is equal to such decreased number of Representatives, they shall be elected from the districts then prescribed by the law of such State; (4) if there is a decrease in the number of Representatives but the number of districts in such State is less than such number of Representatives, the number of Representatives by which such number of districts is exceeded shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; or (5) if there is a decrease in the number of Representatives and the number of districts in such States exceeds such decreased number of Representatives, they shall be elected from the State at large.

SUMMARY OF ARGUMENT

1. The Clerk of the United States House of Representatives is not the proper party defendant in this action.

(a) Concerning the allocation of Congressmen: It is clear under 2 U.S.C. §2a that the Clerk's sole duty is ministerial, to transmit to the State governors a certificate as to the number of Congressmen allotted to their respective States under the President's apportionment statement to Congress. This duty he properly and fully performed.

(b) Concerning voting by District of Columbia residents: The Clerk of the House does not in any way participate in determining the persons eligible to vote in Maryland elections

for Congressman-at-large. The Constitution generally assigns the regulation of such elections and the qualifications of electors to the States themselves, subject to power in Congress to make such regulations as it deems proper. Neither Congress nor Maryland has given the Clerk any powers in this area, nor did he attempt to exercise any such powers. No action within the Clerk's discretion could either permit or deny to District residents the right to vote in Maryland Congressional or primary elections.

2. Appellant has no standing to assert the rights of residents of the District of Columbia to be represented in Congress. Maryland was allotted eight Representatives, the correct number for the population within its borders. Appellant is a resident of Maryland, his own constitutional rights to representation therefore were properly accorded him. He may not litigate the rights of others.

3. The District of Columbia is neither a part of the State of Maryland nor a "State" within the meaning of Article I, Section 2 and 4 of the United States Constitution. Therefore its residents were not entitled to vote for members of the United States House of Representatives.

ARGUMENT

Introduction

Mr. Albaugh has brought this suit against the Clerk of the House of Representatives. He argues that the Clerk has

deprived him, the citizens of Maryland and the citizens of the District of Columbia, of important constitutional rights in connection with the apportionment and election of U.S. Congressmen. We show below that this argument is wholly untenable. We shall make clear in this brief first, that the Clerk performs only formal, ministerial duties in connection with the apportionment of U.S. Representatives, which duties he properly and correctly performed; secondly, that the Clerk of the House of Representatives has nothing to do with the conduct of elections or primary elections for Representatives-at-large in Maryland; thirdly, that the citizens of Maryland (including Mr. Albaugh) received their full constitutional representation in the House; and finally, that the District of Columbia is not within the State of Maryland for purposes of Congressional representation.

1. The Appellee is not the Proper Party Defendant in this action.

(a) The Clerk of the United States House of Representatives Does not Apportion Congressmen Among the Several States.

The United States Constitution provides that "Representatives . . . shall be apportioned among the several States which may be included within this Union, according

to their respective [populations]."^{2/} Congress has provided for the determination of this apportionment in 2 U.S.C. § 2a, 46 Stat. 26, as amended. The pertinent part of this statute provides:

(a) On the first day, or within one week thereafter, of the first regular session of the Eighty-second Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member.

(b) Each State shall be entitled, in the Eighty-third Congress and in each Congress thereafter until the taking effect of a reapportionment under this section or subsequent statute, to the number of Representatives shown in the statement required by subsection (a) of this section, no State to receive less than one Member. It shall be the duty of the Clerk of the House of Representatives, within fifteen calendar days after the receipt of such statement, to send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section.
* * *

Under this statute, the number of Representatives per State is based directly on the census figures, except that

^{2/} United States Constitution, Article I, § 2.

each State is to have at least one member. The census is, of course, taken by the Census Bureau of the Commerce Department in the executive branch of the Government, not by the Clerk of the House.^{3/} The Clerk's duty is limited to sending a certificate to the State governors advising them officially of the number of Representatives allotted their respective States as shown in the apportionment statement furnished by Congress by the President (J.A. 4-5). This is precisely what the Clerk did (J.A. 6-7). If there was any error in apportioning Representatives (which we, of course, deny), it was clearly not that of appellee.

It is highly significant, in this connection, that not very long ago appellant brought a similar action in which he unsuccessfully sought precisely the same relief (the inclusion of District residents as part of Maryland for the purpose of Congressional apportionment) against the Secretary of Commerce, whose Department is responsible for taking the census. In that action he sought to have the apportionment statement corrected. His complaint was dismissed by the district court, Albaugh v. Strauss, Civ. No. 1132-59, and his appeal dismissed by this Court, sub nom. Albaugh v. Mueller, No. 15,456, February 19, 1960 (not reported).

^{3/} 13 U.S.C. § 141.

(b) The Clerk of the House of Representatives did not Prevent Anyone from Voting in Maryland Congressional or Primary Elections.

Few words are necessary to point out the obvious truth of this proposition. The United States Constitution, Article 1, Section 4, declares that the "Times, Places and Manner of holding Elections for . . . Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations" Mr. Albaugh refers to no Congressional enactment giving the Clerk of the House authority to determine the qualifications of voters in Congressional or primary elections. There is, of course, no such law. The actual conduct of Congressional and primary elections is in the hands of State officials. If any of those persons caused Mr. Albaugh to lose an election by improperly denying the ballot to the residents of Washington he cannot get relief in a court action against the Clerk of the U. S. House of Representatives.

For these reasons alone, the action of the district court in dismissing this suit was entirely correct and should be sustained. Moreover, with regard to apportionment of the House, it is entirely clear that appellant has been accorded his full constitutional rights to representation.

2. Maryland has been Allotted Representation in the House on the Basis of the Actual Population Within its Borders; Therefore, Persons Residing Within that State are Properly Represented in Congress and have no Standing to Complain that Persons Resident Outside that State are not Represented.

The population of Maryland, according to the 1960 census as reported in the President's apportionment statement, was 3,100,689 persons (J.A. 5). On this basis Maryland was allotted eight of the 435 total members of the House of Representatives. Mr. Albaugh does not challenge the correctness of the allocation to Maryland based on this population, as indeed he cannot, for it is arithmetically correct. Nor does he challenge the census figures themselves. Mr. Albaugh's contentions boil down to the complaint that the 760,000 residents of the District of Columbia are not represented in the House. They are not, but this gives Mr. Albaugh no standing to complain about it in this court. A litigant may assert only his own constitutional rights, Tileston v. Ullman, 318 U.S. 44; McGowan v. Maryland, 366 U.S. 420. Mr. Albaugh's constitutional right to fair representation in the United States House of Representatives has been properly accorded to him as to all the other residents of Maryland. He has no standing to assert the alleged right of the residents of Washington to such representation.

* * * * *

For the reasons already set forth, it is plain that appellant has no standing to raise here any issue relating to "Whether the District of Columbia is a part of the geographic State of Maryland." In addition, appellant's position on the merits is wholly lacking in substance. On this phase of the case we note here briefly that the Constitution itself authorized the cession of territory by a State to the federal government to serve as the nation's capital. ^{4/} The area which now comprises the District of Columbia was duly ceded to the federal government by Maryland, ^{5/} which cession Congress accepted, ^{6/} in all accordance with that constitutional provision. We do not believe further discussion of this point is warranted. Clearly appellant failed to state a claim against the Clerk of the House upon which relief could be granted. Therefore no questions of constitutional dimension need by (or should be) reached in passing on this appeal. Adequate non-constitutional grounds call for the affirmance of the judgment below.

Alma Motor Co. v. Timken Co., 329 U.S. 129; Burton v. United States, 196 U.S. 283.

^{4/} U.S. Const., Art. I, Sec. 8, cl. 17.

^{5/} Maryland Act of 1788, ch. 46; 1791, ch. 4; 1792, ch. 49; and 1793, ch. 58.

^{6/} 1 Stat. 130, ch. 28; 1 Stat. 214, ch. 17.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the action of the district court dismissing appellant's complaint be affirmed or that this appeal be dismissed.

JOSEPH D. GUILFOYLE,
Acting Assistant Attorney General.

DAVID C. ACHESON,
United States Attorney.

MORTON HOLLANDER,
RICHARD S. SALZMAN,
Attorneys,
Department of Justice,
Washington 25, D. C.

SEPTEMBER 1962

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing brief for appellee has been made upon appellant by mailing a copy to him, William A. Albaugh, 3368 Chillum Road, Apt. 201, Mt. Rainier, Maryland, this ^{2nd} ~~24th~~ day of ^{October} ~~September~~, 1962.

MORTON HOLLANDER
Attorney for appellee.

REPLY BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,242

WILLIAM A. ALBAUGH,

Democratic Candidate for Maryland Representative-at-large
to the United States House of Representatives,
for himself and the people of the geographic State of Maryland,

Appellant,

v.

RALPH R. ROBERTS,

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APPEAL FROM THE UNITED STATES DISTRICT COURT
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United States Court of Appeals
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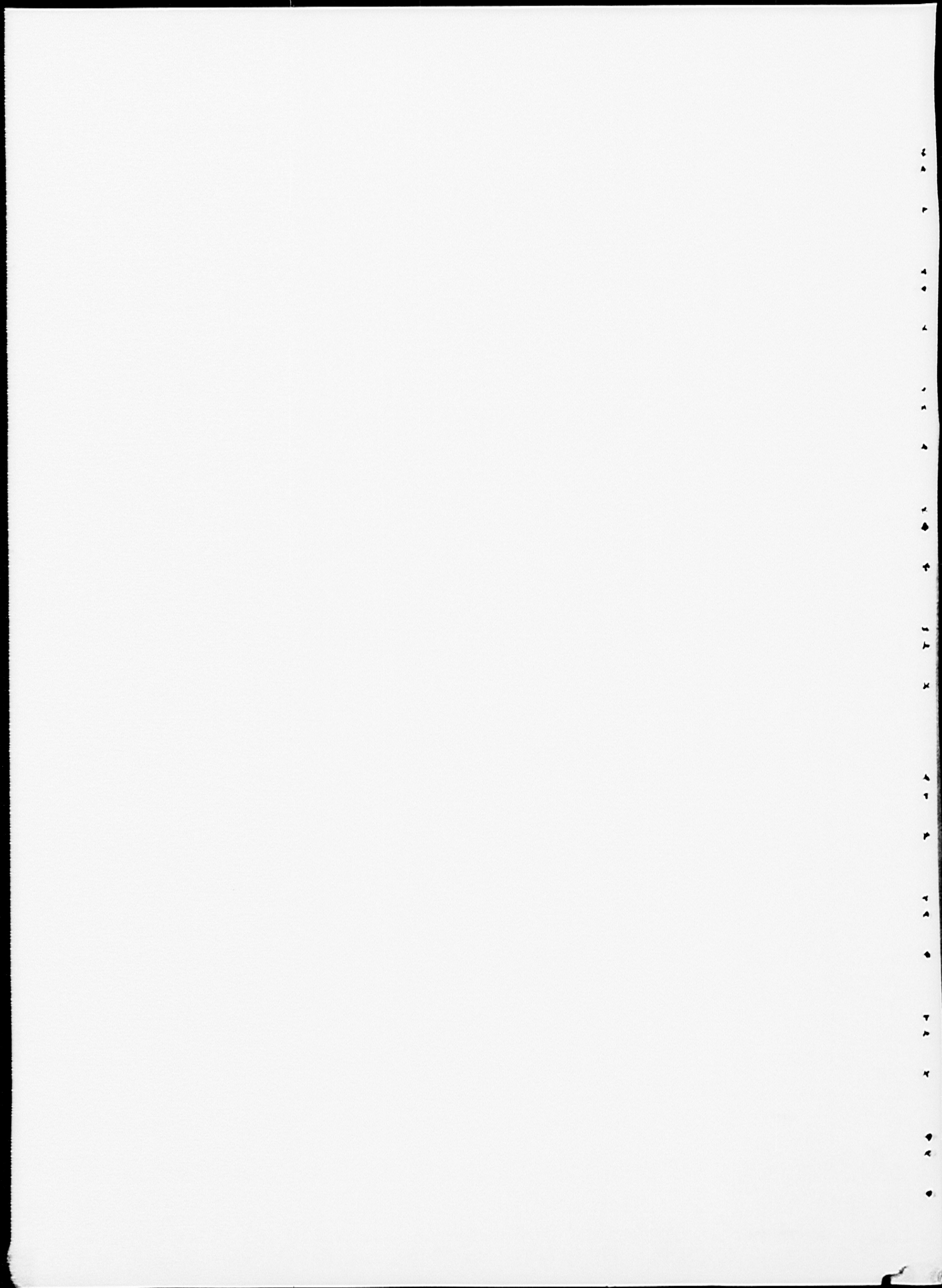
Joseph W. Stewart

CLERK

WILLIAM A. ALBAUGH

3368 Chillum Rd., Apt. 201
Mt. Rainier, Maryland

Appellant, Pro Se



United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,242

WILLIAM A. ALBAUGH,
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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT

REPLY TO APPELLEE'S BRIEF

Appellee has volunteered the opinion that the initial question presented in this appeal is out of order. This is certainly a possibility. However, if the initial question is to be avoided, it

must not be replaced by an alternative question which involves the initial one as a subsidiary question. The alternative questions thus far suggested by the Appellee fail to meet this test.

For instance, if for the sake of argument it is conceded that the District of Columbia is a part of the State of Maryland in the sense that the word "state" is used in the Constitution, Appellee's position in all of his proposed substitute questions is immediately undermined. The contested Apportionment Report (J.A. 4) then fails to pass the test of conformity when compared with the Constitutional requirement that representation must be in direct proportion to state population (see Appellant's Br. 7). Under this hypothetical circumstance the President will have failed to submit a correct apportionment report to Congress and the Appellee would be without authority to implement an incorrect apportionment. But having acted upon an incorrect apportionment, Appellee would certainly make himself a proper party defendant and give Appellant ample standing as a Maryland citizen to seek judicial relief.

The Appellee's analysis of the initial question upon its merits violates a basic principle of Constitutional analysis. Before any position on a Constitutional question can be established as a valid one, that position must be subjected to a rigorous consistency check with every element of the Constitution. The Appellee's position on the initial question is consistent with the naked Constitutional clause that authorizes cession. However, his position will not permit a consistency test with at least one other part of the Constitution (see Appellant's Br. 6). To avoid further inconsistencies, Appellee's Brief omits entirely all possible comments that he might have made about the application of Maryland Election Laws as they were enforced within the District of Columbia after cession.

CONCLUSION

Roughly, the Appellee has failed to avoid the main issue in his Brief by suggesting alternative courses which lead directly to the main issue. In his analysis of the main issue he has restricted his thinking exclusively to a minute fragment of the Constitution and adopted a position which has the dubious distinction of generating the worst inconsistency ever produced under our present form of government.

Respectfully submitted,

WILLIAM A. ALBAUGH

3368 Chillum Rd., Apt. 201
Mt. Rainier, Maryland

Appellant, Pro Se

September, 1962